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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAQUELYN EDENS, Defendant and Appellant.	H045098 (Santa Clara County Super. Ct. No. C1758632)

A jury found defendant Jaquelyn Edens guilty of felony theft or unauthorized use of a vehicle under Vehicle Code section 10851 (section 10851); possession of burglary tools; and possession of controlled substance paraphernalia. The trial court granted a three-year term of probation.

Edens contends her felony conviction under section 10851 must be reduced to a misdemeanor because the prosecution failed to present sufficient evidence to show the stolen car had a value of more than $950 under *People v. Page* (2017) 3 Cal.5th 1175 (*Page*) [under Proposition 47, the theft of a vehicle valued at $950 or less is a misdemeanor].) She further contends we must reduce the conviction to a misdemeanor because double jeopardy principles would prohibit retrial. (*In re D.N.* (2018) 19 Cal.App.5th 898 (*D.N.*) [double jeopardy precluded remand for prosecution to present additional evidence that value of vehicle was in excess of $950].)

For the reasons below, we conclude *Page* requires us to reverse the judgment and reduce the felony conviction under section 10851 to a misdemeanor.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

In June 2017, the prosecution charged Edens with three counts: Count 1—theft or unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a)); count 2—possession of burglary tools (Pen. Code, § 466); and count 3—possession of controlled substance paraphernalia (Health & Saf. Code, § 11364). On count 1, the information alleged, "the crime of THEFT OR UNAUTHORIZED USE OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by JACUELYN EDENS who did drive and take a vehicle, a 1997 Honda Civic . . . ." The matter was tried to a jury.

As to count 1, the trial court instructed the jury as follows: "The defendant is charged in Count 1 with unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. To prove that the defendant is guilty of this crime, the People must prove, number one, that the defendant took or drove someone else's vehicle without the owner's consent. [¶] And, number two, when the defendant did so, she intended to deprive the owner of possession or ownership of the vehicle for any period of time. [¶] A taking requires that the vehicle be moved for any distance, no matter how small."

In August 2017, the jury found Edens guilty on all counts as charged. On count 1, the jury found her guilty of "theft or unauthorized use of a vehicle."

After the verdict, but before sentencing, Edens moved under Penal Code section 17, subdivision (b)(3), to reduce the conviction on count 1 to a misdemeanor under Proposition 47. In August 2017, the trial court denied Eden's motion to reduce the conviction to a misdemeanor. The court suspended imposition of sentence, and granted a three-year term of probation.

In November 2017, the California Supreme Court handed down *Page*, *supra*, 3 Cal.5th 1175, holding that the theft of a vehicle valued at $950 or less is a misdemeanor under Proposition 47.

Facts of the Offense

Around 11:30 p.m. on March 6, 2017, two police officers were patrolling a Walgreens parking lot when they spotted a late 1990s or early 2000 Honda Civic with Edens sitting in the driver's seat and another person in the passenger's seat. Because that model is commonly stolen, the police ran the license plate. They discovered it was reported stolen. The officers pulled their patrol car in front of the Honda and got out to approach it.

At that point, the person sitting in the passenger's side of the car got out and met with another person who was exiting the store. Edens got out of the driver's side of the car and put two bags on the ground. Referring to the other two persons, Edens stated, "They have nothing to do with this." The police searched Edens and found a shaved key in the pocket of her jacket. They also found a glass pipe with burned residue in one of her bags.

Devid Atilano testified that he was the owner of the Honda Civic. He first discovered the car was missing on the morning of March 3, 2017. He had not given anyone permission to take or borrow the car, and he had never seen Edens before. A police officer testified that he did not know whether they had done any investigation to determine who had possession of the car between the time it went missing and the time it was recovered.

Edens testified in her defense. On the evening of March 6, 2017, she was at her friend Tai's house when her boyfriend called and told her to come home because it was getting late. Because she had gotten a call for a job interview at 10:00 a.m. the next morning, Edens wanted to stop at Walgreens on her way home for a special hair clip to wear while riding her bicycle with a helmet on. At that point, her friend Tai suggested that Edens borrow her car—the Honda Civic. Tai told Eden that, several days before, a friend named Ricky had given the car to Tai to watch while Ricky was out of town. Tai then gave Edens the key to the car and told her where the car was. Edens noticed the key

was "a little bit bent" but it started the car so she thought it must be fine. She then drove the car to the Walgreens, where she bought the hair clip.

Edens admitted she had suffered four misdemeanor convictions. She had two convictions for giving false identification to a police officer, one conviction for petty theft, and another conviction for forgery.

On cross-examination, Edens admitted that when the police approached her, she told them that "this must be about the car." She testified that at first she thought she was in trouble for not having a driver's license, but after she thought about how the key "didn't seem right," she thought "everything was falling into place." She testified that she did not know she was driving a stolen car when the police first approached her. She admitted that she had been holding the bag with the glass pipe when she got out of the car, but she testified that the bag had been in the car when she first got in the car, and she did not know there was a pipe in it.

II. DISCUSSION

Edens contends her conviction on count 1 must be reduced to a misdemeanor because the prosecution failed to present sufficient evidence the stolen car had a value of more than $950, as required by Proposition 47. The Attorney General concedes that the jury was not properly instructed on section 10851, but he contends any error was harmless because the record shows beyond a reasonable doubt that the jury convicted Edens of posttheft unauthorized driving of a vehicle, not theft. Assuming the error was not harmless, the Attorney General contends the prosecution should be allowed to retry Edens on remand. Edens argues that double jeopardy principles bar any retrial.[1]

[1] In a supplemental brief, Edens contends a felony conviction for posttheft driving of a vehicle would lead to absurd consequences and violate equal protection. (This issue is currently before the California Supreme Court in *People v. Bullard*, S239488.) Because we are reducing Edens' conviction to a misdemeanor theft, we need not consider this argument.

For the reasons below, we conclude that the trial court erred by not instructing the jury that it was required to find that the value of the vehicle was greater than $950 to convict Edens of a felony. Furthermore, we reject the Attorney General's claim that the error was harmless, and we conclude double jeopardy would bar retrial.

A. Legality of the Felony Conviction

The Attorney General does not contend the prosecution presented evidence sufficient to prove the car was worth more than $950. Furthermore, the Attorney General concedes the trial court failed to instruct the jury that it must find the value of the car exceeded $950 to convict Edens of theft. Nonetheless, the Attorney General argues that the jury found beyond a reasonable doubt that Edens violated section 10851 not by theft, but by driving the car without the owner's authorization—i.e., posttheft driving—a theory of liability that arguably does not required the prosecution to prove the value of the car.

1. Legal Principles

Theft of a vehicle worth $950 or less is a misdemeanor under Proposition 47. (*Page, supra,* 3 Cal.5th 1175.) However, "[a] person can violate section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citation.]" (*People v. Garza* (2005) 35 Cal.4th 866, 876.) "Because vehicle theft often involves driving the vehicle, determining eligibility for resentencing under [Proposition 47] will frequently require distinguishing between theft and unlawful driving after a theft." (*Page, supra,* 3 Cal.5th at p. 1188.)

"Taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and a defendant convicted of violating section 10851 with such an intent has suffered a theft conviction. [Citations.] On the other hand, posttheft driving and joyriding are not forms of theft; and a conviction on one of these bases is not a theft conviction. [Citations.]" (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 854 (*Gutierrez*).) "[W]hen a violation of section 10851 is 'based on theft,' a defendant can be

convicted of a felony only if the vehicle was worth more than $950. [Citation.] It is also necessary to prove the vehicle was taken with an intent to permanently deprive the owner of its possession—'a taking with intent to steal the property.' [Citation.]" (*Id.* at p. 856.)

" 'When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground.' [Citations.] 'An instruction on an invalid theory may be found harmless when "other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary" under a legally valid theory.' " (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.)

2. Sufficiency of the Evidence

The Attorney General contends there is no reasonable doubt that the jury found Edens guilty of posttheft driving rather than theft. He argues that there was no evidence in the record to show that Edens was the person who initially stole the car, and he points to the three-day period between the theft of the car on March 3, 2017, and the apprehension of Edens driving the vehicle on March 6, 2017. (See *Page*, *supra*, 3 Cal.5th at p. 1188 ["Where the evidence shows a 'substantial break' between the taking and the driving, posttheft driving may give rise to a conviction under Vehicle Code section 10851 distinct from any liability for vehicle theft."].) He also points to portions of the prosecution's closing argument focused on Edens' driving of the car.

We are not persuaded. While the evidence would have been sufficient to support a conviction for posttheft driving, the record does not establish beyond a reasonable doubt that the jury convicted her on that theory. The jury reasonably could have found Edens stole the vehicle. She was in possession of the shaved key when she was arrested, and it appears the jury rejected her testimony that she had simply borrowed the car. And as Edens points out, the prosecutor argued several times in closing that she took the car from its lawful owner. We conclude the record does not show beyond a reasonable doubt that the jury found Edens guilty of posttheft driving.

B. Retrial Would Violate Double Jeopardy

Edens contends her conviction must be reduced to a misdemeanor, and that retrial for a felony violation of section 10851 would violate double jeopardy principles. For this proposition she relies on *D.N., supra,* 19 Cal.App.5th 898. The Attorney General contends that the error, if not found harmless, requires us to remand the matter for possible retrial. For this proposition, the Attorney General relies on our opinion in *In re J.R.* (2018) 22 Cal.App.5th 805 (*J.R.*) [double jeopardy did not bar remand for new jurisdictional hearing to consider whether minor's act in committing unlawful driving or taking of car was a felony or a misdemeanor]. (See also *People v. Gutierrez* (2018) 20 Cal.App.5th 847 [double jeopardy did not bar retrial].)

"Double jeopardy forbids retrial after a reversal due to insufficient evidence to support the verdict. Where the prosecution makes its case under the law as it stood at trial, double jeopardy is not implicated as it would otherwise be where there is evidentiary insufficiency." (*D.N., supra*, 19 Cal.App.5th at p. 902.) The parties agree that Proposition 47 was enacted before Edens was tried. "However, federal courts have held that double jeopardy protections do not bar retrial where an intervening judicial decision clarifies that the law requires ' " 'evidence that was not theretofore generally understood to be essential to prove the crime. . . .' " ' (*United States v. Wacker* (10th Cir. 1995) 72 F.3d 1453, 1465 [double jeopardy did not bar retrial where the government presented its proof based on the then-governing rule in the Circuit and, while the case was on appeal, the Supreme Court clarified that additional evidence was necessary to support a conviction]; *United States v. Weems* (9th Cir. 1995) 49 F.3d 528, 530-531 [double jeopardy did not bar retrial where the government failed to prove a particular fact that the Supreme Court had recently held must be proven to support a conviction but, "at the time of trial, under the law of our circuit, the government was not required to prove"].)" (*J.R., supra*, 22 Cal.App.5th at p. 821.)

In *J.R.*, the juvenile court continued the minor as a ward of the court following a jurisdictional hearing on the allegation that he violated section 10851, among other allegations. (*J.R.*, *supra*, 22 Cal.App.5th at p. 809.) On appeal, J.R. argued that the prosecution had failed to put forth sufficient evidence to show the vehicle was worth more than $950. After the California Supreme Court handed down *Page*, *supra*, we found J.R.'s claim meritorious, but we remanded the matter to give the prosecution the option of holding a new jurisdictional hearing. We rejected J.R.'s argument that this would violate double jeopardy. We stated, "It is true that Proposition 47 was in effect at the time of the minor's adjudication. But Proposition 47 did not amend Vehicle Code section 10851, subdivision (a) and, as the ensuing Courts of Appeal opinions show, its impact on that provision was not obvious. Nor are we convinced that *Page* was foreseeable at the time of the minor's adjudication in late fall of 2015. At that time, no court of appeal had held that Proposition 47 applied to Vehicle Code section 10851, subdivision (a). Indeed, the timing of the minor's adjudication distinguishes this case from *D.N.* The juvenile adjudication in that case took place in late fall of 2016, a full year after the minor's adjudication here. In the meantime, Court of Appeal opinions with conflicting holdings regarding the application of Proposition 47 to Vehicle Code section 10851 were issued and our Supreme Court granted review in two of those cases. Thus, even assuming prosecutors were on notice of the potential relevance of vehicle valuation evidence at the time of *D.N.*'s adjudication, that was not the case a year earlier at the time of the minor's adjudication." (*J.R.*, *supra*, 22 Cal.App.5th at p. 822.)

Edens's case is distinguishable from *J.R.*'s case, and it more closely resembles *D.N.*'s case. Edens was tried in August 2017. By that time, Proposition 47 had been in effect for nearly three years. Although there was a split in authority on the issue, Courts of Appeal—including this Court—had held that Proposition 47 applied to thefts charged under section 10851. (See *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted

and opinion superseded (Cal. 2016) 199 Cal.Rptr.3d 734.)[2] As of January 2016, the California Supreme Court had granted review in *Page* to settle the issue. (*People v. Page* (2016) 197 Cal.Rptr.3d 522 [granting petition for review].) Given this context, the prosecution in this case had been given sufficient notice that Proposition 47 required proof that the vehicle was worth more than $950. The Attorney General puts forth no practical explanation for why the prosecutor could not or chose not to adduce such evidence.

For the reasons above, we conclude Edens' conviction must be reduced to a misdemeanor based on the failure to present sufficient evidence to sustain a felony conviction. (*D.N., supra,* 19 Cal.App.5th at p. 904.)

III. DISPOSITION

The judgment is reversed and the conviction on count 1 is reduced to a misdemeanor. The case is remanded to the trial court to amend the minute orders, the abstract of judgment, or any other relevant documents or orders to reflect that the conviction on count 1 is for a misdemeanor.

[2] We cite the decision to explain the procedural background of the case and not as legal authority. (See *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443, fn. 2 [discussing former rule 977].)

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Greenwood, P.J.

WE CONCUR:

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Premo, J.

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Elia, J.

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